IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITON NO.48 OF 2004

Dena Bank, having its Head Office
at Maker Towers (E) Cuffe Parade,
Mumbai - 400 005. ..Petitioner.

V/s.

Venu Gopal Naik,
Room No.3, Bhagubai Niwas,
Sanjay Kathe Building, Ground
Floor, Subhash Road, Opp.
Naupada rickshaw stand,
Dombivli (West),
District Thane. ..Respondent.

Mr.S.K.Talsania, Advocate with Mahesh Londhe i/b. Sanjay Udeshi & Co. for petitioner.

Ms.Kunda Samant, Advocate for the respondent.

CORAM : J.P.DEVADHAR, J.

DATED : 15TH JULY, 2005.

ORAL JUDGMENT

1. By the impugned award dated 5th June, 2003, the Central Government Industrial Tribunal No.1, Mumbai has directed the petitioner bank to reinstate the respondent workman and absorb him permanently as a regular sepoy or its equivalent post with 50% back

wages from 15th August, 1993. The grievance of the petitioner bank is that the respondent who had worked on daily wage basis for 93 days in a leave vacancy during the period from April, 1993 to August, 1993 is neither entitled for reinstatement nor entitled for absorption as a permanent employee of the bank.

3. The facts relevant for the present petition are that the petitioner is a Banking Company constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 having branches all over India. During the period from April, 1993 to August, 1993 the respondent was engaged as a 'badli sepoy' on daily wages by the Manager of the Santa Cruz (E) branch of the petitioner Bank. The respondent was paid daily wages at the rate of Rs.25/- per day. It is not in dispute that the respondent had worked in all for 93 days in the bank as badli sepoy during the aforesaid period. The respondent was orally informed that his services shall stand discontinued from 15-8-1993. It appears that the respondent wrote several letters to the bank seeking regularisation of his services on the basis of his 93 days of daily wage service, but the same was declined by the bank.

4. Thereupon, the respondent raised an

industrial dispute and the Central Government being the appropriate authority made a reference to the Central Government Industrial Tribunal No.1 as per the provisions of the Industrial Disputes Act, 1947. The terms of the reference were:-

> " Whether the action of the management of Dena Bank in not continuing Mr.Venugopal Narayan Nair in the employment of the bank w.e.f. 15.08.1993 and in not absorbing him in the regular vacancy of Sepoy is legal and justified ? If not, what relief the said workman is entitled to ? "

5. Accordingly, the respondent filed statement of claim before the Industrial Tribunal reiterating his demand for absorption as a permanent employee. The petitioner bank filed its written statement stating that the reference was not maintainable. It was stated that the recruitment to the subordinate staff against permanent vacancy was required to be done by following the recruitment procedures prescribed by the Central Government. The respondent filed his affidavit in rejoinder. After the parties led evidence in the matter, both sides were heard and the learned Presiding Officer of the Industrial Tribunal by his award dated 5th June, 2003 held that the petitioner bank acted malafide and committed unfair labour practice and ordered reinstatement of the petitioner with permanency in service and 50% back

wages. Challenging the aforesaid award, the petitioner bank has filed the present petition.

6. Mr.Talsania, learned counsel appearing on behalf of the petitioner submitted that the impugned award is wholly perverse and illegal. According to the learned counsel for the petitioner, even after recording a finding that the respondent was appointed in a temporary vacancy on account of a permanent employee Mr.Ramchandra Gaurav was on long leave and that the respondent has rendered only 93 days of temporary service during the period from April, 1993 to August, 1993, the learned Presiding Officer of the Industrial Tribunal could not have ordered reinstatement of the respondent with permanency in service. Learned counsel for the petitioner submitted that the appointment of subordinate staff against the permanent vacancy in the bank is required to be done by following the prescribed recruitment procedures. He submitted that as per the recruitment procedures of the bank outlined in the light of Government guidelines and bipartite settlement which govern the service conditions of the subordinate staff, the permanent posts are filled by selecting candidates in the interview. The candidates who fulfil the norms of age and qualification, etc. are called for the interview from the employment exchange. He submitted

that under the Bipartite Settlement dated 19th October, 1966 as modified from time to time, even the temporary employees who have completed 240 days of temporary service are called for the interview while filling up the permanent posts by preparing a panel of eligible candidates from amongst the temporary workmen. Learned counsel for the petitioner submitted that the respondent who had only 93 days of temporary service was not eligible to be empanelled and, therefore, the Industrial Tribunal could not have directed the bank to absorb the respondent as a permanent employee of the bank.

7. Learned counsel for the petitioner further submitted that the action of the Manager of the bank in paying daily wages to the respondent by taking signature of the respondent on vouchers in different names was totally wrong. But a wrong action of an officer of the bank cannot be a ground to hold that the bank has committed unfair labour practice and to hold that the bank has treated the respondent as if he was less than a human and grant permanency in service to the respondent. Learned counsel for the petitioner further submitted that the finding of the Industrial Tribunal that the respondent could not complete 240 days because the bank indulged in unfair labour practice by not employing him despite vacancy is

totally perverse and is not based on facts on record. Relying on the decisions of the Apex Court in the case of **A.Umarani V/s. Registrar, Co-operative Societies & Ors.** reported in **(2004) 7 Supreme Court Cases, 112** and **State of Harayana & Ors. V/s. Piara Singh & Ors.** reported in **(1992) 4 Supreme Court Cases, 118**, learned counsel for the petitioner submitted that where the initial temporary appointment itself was in violation of the recruitment rules, the grant of permanency to such an employee is not permissible. He has also relied upon the decision of the Apex Court in the case of **Manager, R.B.I. Bangalore V/s. S.Mani & Ors.** reported in **2005 II C.L.R.3** and submitted that even if the employee had completed 240 days of continuous service that by itself would not give rise to claim permanency in service. Learned counsel for the petitioner submitted in the present case, the respondent had not even completed 240 days of service and, therefore, the Industrial Tribunal ought not to have directed the petitioner to absorb the respondent as a permanent employee. Accordingly, the learned counsel for the petitioner submitted that the award of the Industrial Tribunal suffers from serious infirmities and the same is liable to be quashed and set aside.

8. Ms.Samant, learned counsel appearing on

behalf of the respondent, on the other hand, supported the order passed by the Industrial Tribunal. Learned counsel for the respondent strongly relied on clause 20.8 of the Settlement on the Industrial Disputes between the bank and its workmen dated 19th October, 1966, which reads as under :-

> "20.8 A temporary workman may also be appointed to fill a permanent vacancy provided that such temporary appointment shall not exceed a period of three months during which the bank shall make arrangements for filling up the vacancy permanently. If such a temporary workman is eventually selected for filling up the vacancy, the period of such temporary employment will be taken into account as part of his probationary period. "

9. It was submitted that as per clause 20.8 of the aforesaid settlement, the respondent who has completed more than three months of temporary service was eligible to be called for the interview and on being selected entitled to be absorbed in a permanent vacancy. Relying upon the circular dated 8th December, 1977 which provides that the persons who have worked as badli sepoys for 90 days or more be called for the interview, the learned counsel for the respondent submitted that even though the respondent has completed more than 90 days of temporary service the bank has deliberately not called the respondent for the interview with a view to deny permanency in

service to the respondent. In these circumstances, it was submitted that the Industrial Tribunal was justified in reinstating the respondent. Learned counsel for the respondent submitted that the circular dated 14th July, 1993 which requires the bank to empanel the temporary employees who have worked for 240 days or more is not applicable to the case of the respondent because the respondent was employed as temporary worker even prior to the issuance of the said circular dated 14th July, 1993. Learned counsel for the respondent further submitted that under section 66 (b) of the Shops & Establishments Act, 1948, the services of the respondent who had been in continuous service for more than three months could not be terminated by the bank without giving atleast fourteen day's notice in writing, or wages in lieu of such notice. The learned counsel for the respondent further submitted that the petitioner bank has suppressed the muster roll as well as the pay slips and, therefore, the Industrial Tribunal was justified in drawing adverse inference against the petitioner bank. Learned counsel for the respondent further submitted that in view of the respondent being qualified for permanency in service on account of his temporary service for more than 90 days, the Industrial Tribunal was justified in granting the status of permanency to the respondent. Accordingly,

the learned counsel for the respondent submitted that no interference is called for and the petition is liable to be dismissed.

10. On careful consideration of the rival submissions, I am of the opinion that the fact that the bank had discontinued the temporary services of the respondent even after his rendering 93 days of temporary service cannot be a ground to reinstate the respondent as a permanent employee of the bank and, therefore, the order of the Industrial Tribunal deserves to be reversed.

11. Circular dated 8/12/1977 issued by the bank prescribes the age, qualification, etc. for recruitment of staff in the subordinate cadre. As per the said circular applications equal to about three times the number of vacancies are called by contacting local employment exchanges, Ex-servicemen Boards & Scheduled Caste and Scheduled Tribe associations notified by the Government of India. All eligible candidates out of the applications received and the persons who have worked as temporary / badli sepoys in the bank for 90 days or more are also called for the interview. Rendering 90 days of temporary service in the bank entitles the temporary employee to be called for the interview subject to fulfilment of conditions

and does not ipso facto entitle the temporary employee to claim permanency in service. It is only on selection in the interview, the temporary employee is absorbed as a permanent staff of the bank. As per the Memorandum of Settlement arrived at between the bank and its employees on 25/9/1992 (see circular dated 14-7-1993) temporary employees who are engaged after 1-1-1982 and have worked for 240 days or more on temporary services in any continuous period of 12 months become eligible to be called for the interview.

12. In the present case, it is not in dispute that during April, 1993 to August, 1993, the respondent had rendered 93 days of temporary service in a leave vacancy as Mr.Ramchandra Gaurav a permanent employee of the bank had gone on long leave. The Industrial Tribunal has given a clear finding that the respondent was appointed in a temporary vacancy. The fact that a temporary employee who has rendered 90 days / 240 days of temporary service is eligible to be called for the interview does not mean that on completion of 90 days / 240 days of temporary service, his services must be regularised. Regularisation / recruitment to the posts in the subordinate staff cadre had to be done by following the prescribed recruitment procedure. Even the circular of the bank dated 8/12/1977 on which strong reliance is placed,

clearly provides that the eligible temporary employees can be absorbed only if they are selected in the interview. Without the selection of the respondent in the interview the Industrial Tribunal could not have ordered reinstatement of the respondent as a permanent employee of the bank. The impugned order passed in contravention of the recruitment procedure is, therefore, liable to be quashed and set aside.

13. Strong reliance was placed by the learned counsel for the respondent on clause 20.8 of the Memorandum of Settlement dated 19/10/1966. The said clause has no relevance in the present case. That clause refers to the appointment of a temporary workmen in a permanent vacancy. In the present case, admittedly, the respondent was employed in a temporary leave vacancy and, therefore, reliance placed on clause 20.8 of the Memorandum of Settlement dated 19/10/1966 is wholly misplaced.

14. There is no merit in the contention that the bank has committed unfair labour practice by discontinuing the temporary services of the respondent and appointing some other persons for the remainder period of the leave vacancy. It is well established in law that the services of temporary workman can be dispensed with subject to compliance of the statutory

or contractual requirements, if any. [see (2005) 3 S.C.C. 409]. The respondent has failed to establish that discontinuation of his temporary service was in violation of any of the statutory or contractual obligation. Therefore, no fault could be found with the bank in discontinuing the services of the respondent even after 93 days of temporary service. Once it is held that the bank was within its right to discontinue the temporary service of the respondent, then the bank cannot be accused of committing unfair labour practice on account of discontinuing the services of the respondent.

15. It may be that on account of rendering temporary service for 90 days or more, the respondent was eligible to be called for an interview while filling up the vacant permanent posts if any. But the right to be called for the interview cannot be construed to mean that the respondent had absolute right to be made permanent. As held by the Apex Court in the case of **Manager, R.B.I. Bangalore V/s. S.Mani & Ors. [2005 (5) S.C.C. 100, para 50]** in law, 240 days of continuous service by itself does not give rise to claim of permanence. In the present case, admittedly the respondent was appointed in a temporary leave vacancy and not in a permanent vacancy. Moreover, there is nothing on record to show that

after the respondent completed 93 days of temporary service the bank had conducted interviews by excluding the respondent and filled up the vacant posts, if any. Therefore, even if the respondent was eligible to be called for the interview, in the absence of any material to show that the failure on the part of the bank to call the respondent for interview has caused prejudice, the Tribunal could not have ordered reinstatement with permanency in service. There is no material on record to suggest that any permanent posts were vacant or any permanent posts were filled by ignoring the claim of the respondent.

16. It appears that the learned Presiding Officer of the Industrial Tribunal was carried away by the fact that the Manager of the bank resorted to the dubious method of paying the respondent by issuing pay slips in different names with a view to create false record that different people had worked in the temporary vacancy during the period in which the temporary services were rendered by the respondent. It is true that such a conduct on the part of the Manager of the bank in fabricating documents is wholly improper, illegal and does not befit the person holding the post of a Manager in a nationalised bank. I am sure that the petitioner bank must have taken appropriate action so that such incidents do not occur

again. The illegality committed by a Manager of the bank, however, would not entitle the respondent for being absorbed in the permanent service of the bank without the existence of any vacant permanent post and without the respondent being selected in the interview as per the recruitment norms. As stated earlier, the entire temporary service of the respondent including the services rendered by him by signing vouchers in different names is only 93 days and on account of this 93 days of temporary service, the Tribunal could not have directed the bank to reinstate the respondent as permanent employee without the existence of vacant posts and without requiring the respondent to undergo the selection process.

17. The contention of the respondent that under Section 66(b) of the Bombay Shops & Establishment Act, 1948, the bank was obliged to give atleast 14 days notice in writing before terminating the temporary service of the respondent is also without any merit. Admittedly, the respondent was engaged in temporary service in a leave vacancy for a limited period and on expiry of the period, the services of the respondent automatically came to an end and there was no question of giving any notice to the respondent as contemplated under the Shops and Establishments Act.

18. The decision of the learned Single Judge of the Gujarat High Court in the case of **Nalinkumar A. Thakur and Others V/s. Gujarat State Civil Supplies Co-operation Ltd.& Others (2003 I CLR 278)** relied upon by the counsel for the respondent is distinguishable on facts. In that case (see para 30) the persons who were junior to the petitioners therein were continued in service and new persons were also recruited subsequently and some of them were made permanent. In the present case, the facts are altogether different. In the present case it is an admitted fact that the respondent was appointed in a temporary leave vacancy and the fact that after discontinuing the temporary service of the respondent some other persons were appointed in place of the respondent for the remaining period of the leave vacancy will not entitle the respondent to claim permanency in service. There is no material on record to show that the persons appointed for the remainder period of leave vacancy have been made permanent. Hence the aforesaid decision of the Gujarat High Court is distinguishable on facts. Similarly, the Division Bench decision of this Court in Appellate Side Writ petition No.2737 of 1993 dated 11.02.2003 is also distinguishable on facts because the order in that case was passed on the basis of concession made by the counsel for the employer and not on merits.

19. For all the aforesaid reasons, I am of the opinion that the discontinuation of the temporary service of the respondent from 15/8/1993 was justified and the Tribunal was in error in ordering reinstatement of the respondent with permanency in service and 50% of back wages.

20. Accordingly, the petition succeeds. The impugned award dated 5th June, 2003 made by the Central Government Industrial Tribunal No.1 is quashed and set aside and the rule is made absolute in terms of prayer clause (a) of the petition with no order as to costs.

Sd/-

(J.P.DEVADHAR, J.)